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NO. 80-5122

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

CURTIS BROWNELL, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

ORIGINAL COPY

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S REPLY BRIEF

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1D

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3). Even though the Illinois Supreme Court, as respondent notes, has vacated the sentence of death for petitioner's murder conviction, the Court affirmed the penitentiary sentences imposed for the rape and aggravated kidnapping convictions. Because the convictions for rape and aggravated kidnapping depend upon the confession, at issue in this petition, the questions regarding the confession are ripe. Because petitioner maintains that both the original decision to seek the death penalty, and the Illinois Supreme Court's decision to remand the case for reconsideration of the death penalty, were constitutionally improper, petitioner believes the questions he has raised regarding the death penalty are also ripe.

REASONS FOR GRANTING THE WRIT

I.

THE INTERROGATION OF PETITIONER VIOLATED MICHIGAN V. MOSLEY AND RHODE ISLAND V. INNIS.

The State of Illinois, respondent in this case, has argued that petitioner's right to silence and right to counsel were not encroached upon and that the actions taken by the State during the evening of April 1, 1978 do not violate Innis. (Brief in Opposition, p. 7) Among these actions, respondent concedes, was an offer to forego the death penalty if petitioner would give a statement. Respondent argues, however, that the record makes clear that this "was not an open-ended offer but limited to 'that time, right now.' (A. 122)" (Brief in Opposition, p. 8)

Several factors undo this assertion. First, this description of the offer is made by only one witness, a policeman who merely overheard the purported offer as it was made to defense counsel. No other witness described the offer in limited terms. Specifically, petitioner understood the offer was simply that should he confess, the death penalty would not be requested. (C. 373) Another police officer understood the offer in similar general terms: if petitioner would give a statement the State would not seek the death penalty. (C. 309)

Second, the fact that the petitioner was clearly allowed more time to consider the offer (C. 346, 356, 373) after he first refused to give the statement (C. 276, 324, 355), is evidence that the offer was open-ended.

Thirdly, strict rules of offer and acceptance do not govern the situation, in any event. Brewer v. Williams, 430 U.S. 387, 401 n. 8 (1977). The defendant understood the offer to be open-ended and its import was surely such that the police should have known it was likely to induce a confession. It thus constituted interrogation under the Innis standard; and such interrogation violated the scrupulous honoring of petitioner's right to cut off questioning required by Mosley.

II.

PETITIONER'S RIGHT TO COUNSEL WAS NOT PROPERLY OBSERVED IN THIS CASE.

Respondent has argued that petitioner effectively waived his right to counsel before confessing after a previous request for and consultation with his lawyer. (Brief in Opposition, p. 9-10) Petitioner stands on his original contention that the State deliberately created a situation likely to induce petitioner to make an incriminating statement without the presence of counsel. Despite the efforts of respondent State of Illinois to distinguish United States v. Henry and United States v. Morrison, the principle of these two cases stands for petitioner against the State: the State may not engage in a deliberate interference with the right to the assistance of counsel.

In Henry, the government intentionally created a situation, by the use of a paid informer, very likely to induce Henry to incriminate himself outside the presence of his lawyer. This principle is not confined to the facts in Henry, including the use of an undisclosed informer, as the state intimates. (Brief in Opposition, p. 11)

In Morrison, government agents deliberately attempted to destroy the existing attorney-client relationship between Morrison and her lawyer. Morrison did not involve "repeated forceful and willful intrusions by government agents into a defendant's home," as the State asserts (Brief in Opposition p. 11), but did involve face-to-face efforts by agents to persuade Morrison to fire her lawyer in order to better cooperate with them to gain a favorable sentencing recommendation. Morrison, 602 F. 2d at 530-531. These facts led the Court of Appeals to denounce as "thoroughly unjustified and wrongly motivated" the interference with the attorney-client relationship. Morrison, 602 F. 2d at 533. The facts in this case, revealing efforts by the State to induce petitioner to fire his lawyer, in order to confess to gain a sentencing benefit, are similarly egregious and require review by this Court.

III.

A PROSECUTOR, HAVING OBTAINED PETITIONER'S CONFESSION, MAY NOT ABSENT GOOD REASON THEN REQUEST A DEATH SENTENCE HEARING AFTER PROMISING NOT TO DO SO IF PETITIONER WOULD CONFESS.

Respondent asserts that petitioner places "great emphasis" on Santobello v. New York, a case which is wholly "inapposite." (Brief in Opposition p. 12) For all the reasons stated in his original petition, petitioner reiterates that Santobello, along with Beck v. Alabama, make clear that fundamental fairness has been breached in this case. Because constitutional principles and not rules of contract law must govern this case, Brewer v. Williams, 430 U.S. 387, 401 n. 8 (1977), Santobello is entitled to great emphasis on this question.

The State also asserts that "there is nothing inherently unconstitutional about negotiations between the State and the accused" over constitutional rights. (Brief in Opposition p. 12) Although this principle is generally true, it does not account for an Illinois prosecutor's bargaining directly with his absolute discretion to request a death sentence hearing. Such bargaining lays bare the prosecutor's decision that his proof is insufficiently strong to seek the ultimate punishment, or that his determination that society's need for additional evidence against a defendant outweighs society's need to put him to death. For the reasons argued in the original petition, pp. 29-30, this factor requires that the death sentence be precluded in this case.

IV.

THE MITIGATING FACTOR "UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, ALTHOUGH NOT SUCH AS TO CONSTITUTE A DEFENSE TO PROSECUTION," IS UNCONSTITUTIONALLY VAGUE.

Respondent asserts that the "extreme mental or emotional disturbance" mitigating factor is "clear on its face and can be easily applied to the evidence in a particular case," discounting petitioner's use of the Godfrey and Lockett opinions of this Court. (Brief in Opposition p. 14) Godfrey reiterates the principle that there must be clear and objective standards to provide specific and detailed guidance to the sentencer's exercise of discretion.

Godfrey, 100 S.Ct. at 1764-1765. That these maxims apply to the entire capital sentencing process, covering both aggravating and mitigating evidence, is the contention advanced in this petition. Such principles must be conjoined with the rule of Lockett v. Ohio, 438 U.S. 586 (1978), that mitigation not be unduly limited, so that there be no risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

The danger with the "extreme mental or emotional disturbance" factor is that no guidance is provided by the statute or has been furnished by the courts as to how to adjudge whether this statutorily prescribed factor is present in a given case. A narrow reading of the statute, such as the one rendered in this case, tends to defeat the aims of properly channeling the sentencer's exercise of discretion, and an offender's broadening opportunity to show mitigation. The conditional reading of the factor by the sentencing judge in this case, dependent on proof of an identifiable triggering event (R. 577), resulted in the finding that no extreme disturbance existed. This finding deprived petitioner of the weighing of this mitigating factor in the decision that he be sentenced to death; yet no part of the statute or any case law calls for such a conditional interpretation.

Petitioner does not contend that the mitigating factor be "strictly defined," as the respondent suggests he does. Petitioner rather asserts that the meaning of this factor must be established by some clear and objective guidelines for all the Illinois sentencers who must decide its existence case by case. Such guidelines will eliminate arbitrary rejection of the existence of this mitigating factor.

For these reasons and all the reasons set forth in the original petition, petitioner asks this Court to issue its writ of certiorari on this question.

V.

THE STANDARDLESS POST-CONVICTION DISCRETION TO REQUEST OR WAIVE THE DEATH PENALTY VESTED IN ILLINOIS PROSECUTORS UNDER THE ILLINOIS DEATH PENALTY STATUTE VIOLATES THE EIGHTH AMENDMENT.

Respondent accuses petitioner of attacking "the integrity of

the various State's Attorneys in Illinois," in asserting that the personal beliefs or office policies of the many prosecutors will play a role in requesting or waiving the death sentence. (Brief in Opposition p. 16) It must be noted that the suggestion originated with a Justice of the Illinois Supreme Court, as set out in the original petition, p. 39; and that the belief is based not on any disrespect for Illinois prosecutors but on the unbridled grant of discretion made in the statute. Thus, the acute problem here is that the Illinois Death Penalty Act equally allows a prosecutor to either request or waive the special sentencing hearing in good faith and accordance with the law. Even assuming, then, that Illinois prosecutors always act in accord with the law, the law imparts such unbridled discretion to State's Attorneys that they may do as they wish. In this setting, it is "inevitable" that the personal beliefs of Illinois prosecutors will play too large a role in the imposition, or not, of the death penalty.

For all the reasons stated in the original petition, this is insufficient guidance to prevent arbitrary imposition of the death penalty in Illinois. Petitioner asks that a writ of certiorari issue to review this question.